

FIFTH DIVISION
October 23, 2015

No. 1-14-1167

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAPITAL ONE BANK USA, N.A.)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 M1 142180
)	
ROBIN SCHUBITZ,)	Honorable
)	Anthony L. Burrell,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court did not err in denying defendant's motion for substitution of judge as of right where it had previously ruled on a substantive issue.

¶ 2 Defendant Robin Schubitz appeals from the \$5,300 judgment in favor of plaintiff Capital One Bank USA, N.A., following a bench trial in this breach of contract action. Defendant contended in her opening brief that the trial court erred in denying her motions for rehearing on her motion to dismiss and substitution of judge as a matter of right. In her reply brief, defendant

maintains that the issue on appeal is whether the court's denial of her motion for substitution of judge was correct. We affirm.

¶ 3 On July 29, 2013, plaintiff filed a one count complaint against defendant, seeking \$6,040.38, the balance due and owing on a credit card account, plus costs. Plaintiff attached an affidavit from Kathy Cimburke, an employee of Capital One Services, LLC, which was an agent and affiliate of plaintiff. In the affidavit, Cimburke attested that, according to plaintiff's records, a Capital One account was opened in defendant's name for the purpose of obtaining an extension of credit. The account was used to acquire goods, services, or cash advances in accordance with the customer agreement governing use of that account. Defendant failed to make the required periodic payments on the account, and was indebted to plaintiff for the sum listed in the complaint. On August 28, 2013, defendant filed her *pro se* appearance, and the matter was given an initial status date of September 17, 2013.

¶ 4 On September 17, 2013, both parties appeared in court and defendant presented her *pro se* motion to dismiss plaintiff's complaint pursuant to sections 2-619 and 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619, 2-615 (West 2012)). In it, defendant contended that plaintiff's complaint should be dismissed with prejudice because the count is time barred by the applicable statute of limitations period under section 2-619(a)(5) of the Code. Alternatively, she asserted that the complaint was defective under section 2-615 of the Code because plaintiff failed to establish the existence of a valid and enforceable contract. Defendant's motion to dismiss was denied by the trial court, and the matter proceeded to trial.

¶ 5 On October 23, 2013, counsel for plaintiff and *pro se* defendant appeared in court for a bench trial. Defendant presented a motion for substitution of judge, which the trial court denied.

In a written order dated October 23, 2013, the trial court indicated that it denied the motion because "[a] substantive ruling *** [was] previously *** made when the judge denied defendant's motion to dismiss on 9/17/13," and added that "a finding was made that plaintiff's complaint was filed within the statute of limitations."

¶ 6 After the court denied defendant's motion for substitution of judge, the matter proceeded to trial. The record shows that plaintiff presented evidence including, but not limited to, the credit card application, customer agreement, account statements, and copies of payments made by defendant to plaintiff. However, the record does not contain any transcripts from the trial. In the same October 23 order discussed above, the court entered "judgment for plaintiff after bench trial in the amount of \$5,300. Court costs based on the issues of credibility of defendant's testimony."

¶ 7 On November 22, 2013, defendant filed a *pro se* "motion for new trial and for rehearing on her motion to dismiss," contending that the evidence at trial did not show she opened an account with plaintiff. The November 22 motion also stated that the trial court refused to hear or read her September 17, 2013 motion to dismiss, and repeated arguments contained in that motion. Plaintiff responded, contending that defendant's motion for new trial failed to cite any authority which would give her the right to a new trial, and failed to raise any new defenses or make any new allegations other than the same defenses and allegations she made at trial. Plaintiff further maintained that although the record is devoid of the trial court's reasoning for denying defendant's motion to dismiss plaintiff's complaint, denial was proper where defendant failed to obtain leave of court prior to filing her motion to dismiss, plaintiff's complaint was filed within the statute of limitations, and the complaint contained facts entitling it to relief.

¶ 8 Defendant, through an attorney, replied that the record did not contradict her contention that the court failed to read her motion to dismiss. Furthermore, she maintained that the court improperly denied her motion for substitution of judge because, at the time she requested substitution, the judge had not made a substantive ruling in the matter. Instead, the court only denied her motion to dismiss, which was based on procedural defaults, not the merits. Because the motion for substitution was not properly denied, defendant asserted that all subsequent rulings by the court were void. On March 25, 2014, the trial court denied defendant's motion, and defendant appealed.

¶ 9 On appeal, defendant initially contended in her opening brief that the trial court erred in denying her motion for rehearing on her motion to dismiss, as well as her motion for substitution of judge as of right. In her reply brief, however, defendant stated that "the issue before this Court is reduced to whether the denial of [her] motion for substitution was incorrect." Therefore, we need only address the issue of whether the trial court erred in denying defendant's motion for substitution of judge.

¶ 10 Civil litigants in Illinois are entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2) (West 2012). The trial court must grant a party's motion for substitution of judge as of right if the motion is "presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). A substantial issue is one directly relating to the merits of the case. *In re Marriage of Abma*, 308 Ill. App. 3d 605, 610 (1999). "Examples of rulings on substantial issues include situations in which the trial court has ruled on a motion to dismiss, made pretrial rulings of law or where the party moving for a substitution of judge has discussed

issues with the trial judge, who then indicated a position on a particular point." *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002). Whether the trial court has ruled on a substantial issue is a question of law, which we review *de novo*. *Williams v. Estate of Cole*, 393 Ill. App. 3d 771, 775 (2009).

¶ 11 Here, defendant presented her motion for substitution of judge on the morning of trial. Prior to trial, however, the court ruled on defendant's motion to dismiss plaintiff's complaint, which is a substantive ruling. *Partipilo*, 331 Ill. App. 3d at 398. Because the court had previously ruled on a substantive issue in this case, it did not err in denying defendant's motion for substitution of judge, and the subsequent orders entered by the trial court in this case were not void, as suggested by defendant. See *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 24 (stating that any orders entered by a court following an improper denial of a motion for substitution of judge are void).

¶ 12 Defendant concedes in her reply brief that a ruling on a motion to dismiss can be on the merits, but asserts that "[t]here is nothing to suggest that the trial court considered any issue in denying the motion to dismiss," and the court's ruling "was most likely a procedural matter." In so arguing, defendant omits the fact that the reason there is nothing in the record showing why the trial court denied her motion to dismiss was because there are no transcripts from any of the hearings in this matter, nor an acceptable substitute, such as a bystander's report or agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Absent such record, we must presume the trial court was correct. See *Moenning v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶ 38 (an appellant has the burden of presenting a sufficiently complete record of proceedings to support a claim of error; in the absence of a complete record on appeal, we

presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) ("[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant"). Here, defendant, as the appellant, provided documents showing her September 17, 2013 *pro se* motion to dismiss, and the trial court orders denying her motions to dismiss and for substitution of judge. Notably, defendant had asserted that plaintiff's complaint was not only time-barred under section 2-619, but also failed to state a cause of action under section 2-615. Without transcripts of any of the hearings in this matter or an acceptable substitute, we must presume the trial court followed the law and had a sufficient factual basis for denying defendant's motions, as well as entering the \$5,300 judgment in favor of plaintiff. To the extent defendant attempts to rebut plaintiff's reasons for why it believed the court may have denied her motion to dismiss, we note that because the record does not contain any transcripts, any assertions made by either party as to the court's reasoning is speculative at best.

¶ 13 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 14 Affirmed.